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In the Supreme Court of the United States

OCTOBER TERM, 1979

LEAK REPAIRS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging two employees because of their union activities.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 1

Section 8(a)(3), 29 U.S.C. 158(a)(3) 1

OPINIONS BELOW

The order of the court of appeals (Pet. App. 29a-34a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 1a-28a) are reported at 241 N.L.R.B. No. 38.

JURISDICTION

The order of the court of appeals issued on May 21, 1980. The petition for a writ of certiorari was filed on July 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set forth at Pet. 2-3.

STATEMENT

1. Adopting the decision of the Administrative Law Judge, the National Labor Relations Board found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging two of its employees because of their union activities (Pet. App. 24a).[1] The facts on which the Board's finding is based are as follows.

In April 1977,[2] employees Paver and Jenkins began actively to promote unionization among their fellow employees at petitioner's facility in Alsip, Illinois. They discussed the advantages of union representation with

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[1] The Board also found that petitioner violated Section 8(a)(1) of the Act "by threatening its employees with layoff, plant closure, loss of promotion[,] and other reprisals if they chose union representation" (Pet. App. 24a). This finding was upheld by the court of appeals (Pet. App. 30a), and petitioner does not contest it here (Pet. 3).

[2] All dates referred to in this brief are in 1977 unless otherwise noted.

other employees on "almost * * * a daily basis," attempted to enlist the organizational assistance of two local unions, and arranged a breakfast meeting at which they and other employees compiled a list of "gripes" and discussed the possibility of unionization. (Pet. App. 4a-5a, 7a; Tr. 41-51, 99-103, 148-152, 172; GCX 7.)[3] Upon learning of the interest of these employees in union representation, petitioner's agents repeatedly threatened Jenkins, Paver, and other employees with plant closure and similar reprisals if the shop "went union" (Pet. App. 5a-10a, 20a).

On Monday, June 6, Paver and Jenkins were assigned to a nearby refinery to repair a leaking heat exchanger. The two employees determined that an improvised clamping apparatus would correct the problem and telephoned the specifications for such a clamp to petitioner's engineering department.[4] When the clamp arrived the following Saturday, Paver and Jenkins discovered that the engineering department had not included the packing they had requested, and the clamp failed to seal the leak. Nevertheless, they attempted for 12 hours to remedy the problem. (Pet. App. 13a, 14a-15a; Tr. 78-80, 124-127). When Paver explained the situation to Foreman Leone, he was told not to "worry about it"—

[3]"Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the exhibits introduced by the General Counsel at that hearing.

[4]Paver and Jenkins decided to order a "packing clamp," which petitioner concedes (Tr. 279) would have sealed the leak in question, with a tongue to "tak[e] up space" (Tr. 74) in the gap. Since the packing material—and not the tongue of the clamp—was intended to effect the seal, they decided to order a tongue somewhat smaller than the gap in order to avoid the sometimes cumbersome task (Tr. 72, 167) of installing a full-sized tongue. For this reason, they recorded the gap as 3.5 inches, rather than the 3.75 inches that they had measured, and relayed that specification to the engineering department. (Pet. App. 11a-12a, 13a-14a; Tr. 70-75, 90-91, 113, 116-122, 125; GCX 8.)

that "[e]verybody makes mistakes"—and that he should order another clamp (Pet. App. 13a, 15a; Tr. 80, 126-127, 178-179). Alsip Branch Manager Spencer also told him not to worry and to order another clamp (Pet. App. 15a; Tr. 128).

The following Monday morning, Superintendent Randolph summoned Paver and Jenkins to Spencer's office. Randolph told the employees that they had made a serious mistake while attempting to fix the leak. Paver protested that he and Jenkins had not made any mistake, since the engineering department had not made the clamp to their specifications. Randolph nonetheless fired both employees. (Pet. App. 13a; Tr. 81-82, 129-130.)

Later that day, employees Gazelle and Durham approached Spencer and asked why Paver and Jenkins had been discharged. Spencer referred to the problem with the clamp. Gazelle replied: "If that's the case, that explains why [Paver] was fired. He was the technician. How come [Jenkins] was fired[?] He's just an assistant [who has no] final say-so in the measuring of a clamp." Spencer stated that he had "talked to Texas [petitioner's headquarters], and when Texas asked who the assistant on the job was, and he had told him Milt Jenkins, [Texas] said get rid of him too." Durham then said that he and Gazelle were "worried about being fired, too * * * [f]or the same thing that Jenkins and Paver were fired for." Spencer replied, "Don't worry about it. Nobody else will be fired for the same thing." (Pet. App. 15a-16a; Tr. 159-160, 181-182.)

In the period preceding their discharge, neither Jenkins nor Paver had received reprimands or criticism concerning their work. Petitioner's Employee Progress Reports—current through the date that Jenkins and Paver were

fired—consistently praised their "judgment" as "outstanding" and described their "job performance" in superlative terms. (Pet. App. 13a, 15a n.6, 23a; Tr. 82, 85, 131; GCX 3, 4, 5, 6, 11.) Although other employees had previously made "mistakes" in measuring, ordering, and installing sealing clamps, Jenkins and Paver were the first to be discharged for such conduct (Pet. App. 18a, 23a; Tr. 13-15, 31-32, 134-135, 183-186).

2. During the unfair labor practice hearing, petitioner contended that Jenkins and Paver had been discharged because of their admitted failure to report the accurate measurements of the leaking flange on the heat exchanger. Petitioner relied on the testimony of supervisor Leone that Paver and Jenkins had submitted erroneous measurements to petitioner's engineering department on Monday, June 6, prior to installing the repair clamp on Saturday, June 11. Paver, according to Leone, had stated that they had deliberately done so because Paver "had a few things to do [Saturday] and * * * didn't feel like working on [the clamp] all day long" (Pet. App. 18a; Tr. 37). Petitioner claimed that this admission of intentional misfeasance was the basis for discharging Jenkins and Paver (Pet. App. 16a-18a; Tr. 9, 18-19, 38).

The Administrative Law Judge disbelieved this account of the events leading to the discharges (Pet. App. 20a). The Administrative Law Judge noted that, as Leone conceded (Tr. 319-321), neither Paver nor Jenkins could possibly have known when they ordered the clamp on Monday, June 5, exactly when the clamp would be delivered. Hence, it was extremely unlikely that they submitted false measurements on Monday because Paver "had a few things to do" and "didn't feel like working * * * all day" the following Saturday. Moreover, petitioner's officers gave directly conflicting accounts of their decision to discharge Paver and Jenkins. Thus,

Branch Manager Spencer testified (Pet. App. 17a; Tr. 8) that he "never mentioned" either employee's name to Vice President Harrison, and that Harrison left the discharge decision "up to [him]." Harrison, on the other hand, testified (Pet. App. 17a-18a; Tr. 19) that Spencer had told him the names of the persons involved and that he ordered Spencer to "get rid of them."

In finding that petitioner's explanation for discharging Paver and Jenkins was pretextual, the Administrative Law Judge also relied (Pet. App. 23a) on the "good work records" of both employees and petitioner's "willingness * * * to tolerate [employee] mistakes in the past." Thus, referring to petitioner's "strong opposition to the employees' union and related protected concerted efforts" and the "timing of their * * * discharges," the Judge concluded that the "real reason" for firing Paver and Jenkins was anti-union animus (*ibid.*).

3. The court of appeals upheld the Board's decision and enforced its order. After referring to Paver's and Jenkins' "exemplary work records," the Court stated that (Pet. App. 33a):

> It is true, as the Board found, that Paver and Jenkins made "a mistake in judgment by not sufficiently and clearly apprising their superiors of their improvisation." But, as the Board noted, [petitioner] had never discharged any other employee for making mistakes; indeed, shortly after the discharge of Paver and Jenkins, the manager of the Alsip facility assured employees Gazelle and Durham that "[n]obody else will be fired for the same thing." These facts, as well as the conflicting accounts of the discharges given by [petitioner's] witnesses which were discredited by the Board, provide strong support for the Board's finding that antiunion considerations—and not the problems

with the clamp—moved [Petitioner] to discharge Paver and Jenkins.

ARGUMENT

Petitioner asks the Court to grant certiorari to resolve a conflict among the circuits as to the standard to be applied in discriminatory discharge cases when there is evidence that an employer had both proper and improper motives for the discharge (Pet. 7-13). However, that question is not presented on this record. The Board's decision here, which was affirmed by the court of appeals, was that petitioner was not motivated by a valid (non-pretextual) reason in discharging the employees. The sole basis for the discharges was anti-union animus.[5] Thus, the only question presented in this case is whether substantial evidence supports the Board's finding that the discharges were not motivated by a legitimate business consideration. That evidentiary issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's assertion (Pet. 7-18), the court of appeals' decision in this case does not conflict with *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), or *NLRB* v. *Eastern Smelting and Refining Corp.*, 598 F. 2d 666 (1st Cir. 1979).[6] Those

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[5]While both the Administrative Law Judge (Pet. App. 21a) and the court of appeals (Pet. App. 30a) referred to the mixed motive cases, neither found that petitioner was actually motivated by any asserted valid ground for discharge. The Board's decision—and the court's affirmance—rest squarely on the finding that "the real reason for [the employees'] discharge[] was their union and related protected concerted activities. * * * Management seized upon [the employees'] mistake as an excuse to deter and chill the unionization * * * at the Alsip shop" (Pet. App. 23a, 33a-34a).

[6]Petitioner's assertion (Pet. 8) that the court of appeals "dismissed petitioner's citation of *Mt. Healthy* and *Eastern Smelting* as 'inapposite' " is inaccurate. The court's opinion does not mention *Mt.*

cases stand for the proposition that, once the Board has made a *prima facie* showing that a discharge was discriminatorily motivated, an employer "may still defend by proving that there was a good reason for the discharge and that 'it would have reached the same decision * * * even in the absence of the protected conduct.' " *Eastern Smelting*, *supra*, 598 F. 2d at 671, quoting *Mt. Healthy*, *supra*, 429 U.S. at 287. Petitioner does not deny that the Board established its *prima facie* case here. Indeed, as the court of appeals held (Pet. App. 32a-33a), the "abruptness" of the discharges, their timing—"coming, as [they] did, shortly after [petitioner] became aware of [the] outspoken pro-union sentiments" of Paver and Jenkins, and the "antiunion attitude" manifested by the repeated threats of plant closure and other reprisals are "persuasive" and "highly significant" evidence that anti-union animus was the cause for the discharges. Compare *Eastern Smelting*, *supra*, 598 F. 2d at 674, 675.

Accordingly, the burden of proof shifted to petitioner to establish that it "had a good reason, sufficient in itself, to produce the discharge[s]." *Eastern Smelting*, *supra*, 598 F. 2d at 671, citing *Mt. Healthy*, *supra*, 429 U.S. at 287. However, as the court of appeals explained (Pet. App. 33a), petitioner wholly failed to sustain its burden. The evidence did not show that Paver and Jenkins would have been fired for their "mistake" even in the absence of anti-union animus. To the contrary, both employees had exemplary work records. Petitioner's own official stated that other workers would not be fired for making the same mistake. In addition, no other employees had been fired for making mistakes in measuring, ordering, and installing clamps in the past, and petitioner's witnesses

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Healthy or *Eastern Smelting*. Indeed, petitioner did not cite those cases in its brief in the court of appeals. Rather, it cited them in a letter sent to the court more than a month after oral argument and two weeks before the court handed down its decision.

gave hopelessly conflicting accounts of the discharge decision. In these circumstances, the evidence clearly established that petitioner had seized upon the employees' mistake as an excuse and that its real purpose in firing the employees was to punish and deter protected unionization activities.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Compare *Eastern Smelting*, *supra*, 598 F. 2d at 670, distinguishing cases in which the alleged "good reason was not a motivation at all" and cases in which both a "[b]ad reason and good reason" animate the decision to discharge an employee. In the present case, there was no occasion for the Board to grapple with the legal significance of a bona fide motivation for a discharge in a "mixed motive" situation, since the evidence showed that the claimed bona fide justification was a sham.